(2)

Supreme Court, U.S.
FILED
JAN 17 1997
CLERK

No. 96-975

In The

Supreme Court of the United States

October Term, 1996

JOHN CROSETTO,

Petitioner,

v.

STATE BAR OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*JOHN S. SKILTON
WILLIAM M. CONLEY
ROBERTA F. HOWELL
FOLEY & LARDNER
150 East Gilman Street
Post Office Box 1497
Madison, Wisconsin 53701-1497
(608) 257-5035

Attorneys for Respondent State Bar of Wisconsin

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 1PP

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that the State Bar of Wisconsin is immune from suit in the federal courts under the Eleventh Amendment to the United States Constitution.

2. Whether the district court properly exercised its discretion in denying leave to amend a complaint adding new parties and new claims, where the only issue remaining on remand was jurisdictional, discovery had been completed, and the proposed claims were already the subject of a pending parallel case.[1]

---

[1] The State Bar has not presented a counterstatement to petitioner's third question presented. That question relates to petitioner's claims concerning the constitutionality of the arbitration provisions of the State Bar's dues reduction rule. Those claims were already decided adversely to petitioner on his first appeal in this matter. *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1404-05 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2138 (1994). While petitioner sought to amend his complaint to challenge the present dues reduction rule, adopted while the first appeal was pending, the relevant portions of the arbitration provisions are identical to those considered in the first appeal. *See* 12 F.3d at 1399 n.3; SCR 10.03(5)(b) (Supp. App. 7a-8a). Thus, the Court has already denied a petition for *certiorari* on petitioner's third question presented. *See infra* pp. 1-3 (detailing procedural history of this case). To the extent petitioner sought to raise new challenges to the present rule in his amended complaint, his motion to amend was properly denied. *See infra* pp. 13-14.

LIST OF PARTIES AND RULE 29.1 LIST

In addition to the names of parties which appear in the caption of this case, Douglas Kammer and Kenneth Doran were parties to the proceeding in the Court of Appeals. By order dated March 15, 1996, Mr. Doran was voluntarily dismissed as a party to the appeal. Mr. Kammer has not joined in the petition here. None of the parties below or before this Court is a corporation.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.1 LIST ii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

A. Course of Proceedings Below 1

B. Statement of Relevant Facts 4

1. The Wisconsin Supreme Court has ultimate, direct and exclusive control over the State Bar and the Bar is the Court's agent in enforcing the rules challenged here ... 4

2. State Bar funds are state funds 9

3. The State Bar is a state agency under Wisconsin law 9

C. Response to Petitioner's "Factual Background." 10

REASONS FOR DENYING THE WRIT 11

I. THERE IS NO CONFLICT IN THE CASE LAW .. 11

A. There Is No Conflict In The Tests Used By The Courts Of Appeals To Determine Whether An Entity Is An Arm Of The State Under the Eleventh Amendment 11

B. This Court Has Already Resolved Any Arguable Uncertainty 13

TABLE OF CONTENTS – Continued

Page

C. The Lower Courts Are Unanimous In Holding That Integrated Bars Are Entitled To Eleventh Amendment Immunity 15

II. PETITIONER'S MOTION TO ADD NEW PARTIES AND NEW CLAIMS WAS PROPERLY DENIED WHERE THE ONLY ISSUE REMAINING ON REMAND WAS JURISDICTIONAL, DISCOVERY HAD BEEN COMPLETED AND THE NEW CLAIMS WERE ALREADY THE SUBJECT OF A PARALLEL PROCEEDING..... 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Pugh, 438 U.S. 781 (1978) 14

Axel v. State Bar of Wisconsin, 21 Wis. 2d 661, 124 N.W.2d 671 (1963) 8

Burcher v. McCauley, 871 F. Supp. 864 (E.D. Va. 1994) 15

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 340 (1995) 12

Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983) 15

Cohran v. State Bar of Georgia, 790 F. Supp. 1568 (N.D. Ga. 1992) 15

Conroy Datsun Ltd. v. Nissan Motor Group, 506 F. Supp. 1051 (N.D. Ill. 1980) 18

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 17

Cory v. White, 457 U.S. 85 (1982) 13, 14

Crosetto v. Heffernan, 771 F. Supp. 224 (W.D. Wis. 1990) 2

Crosetto v. Heffernan, 810 F. Supp. 966 (W.D. Wis. 1992) 2, 10

Crosetto v. State Bar of Wisconsin, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2138 (1994) .....i, 1, 2

Disciplinary Proceedings Against Cyrak, 124 Wis. 2d 493, 369 N.W.2d 708 (1985) 6

Edelman v. Jordan, 415 U.S. 651 (1974) 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

Foman v. Davis, 371 U.S. 178 (1962) 16, 18

Franceschi v. Schwartz, 57 F.3d 828 (9th Cir. 1995) 12

Ginter v. State Bar of Nevada, 625 F.2d 829 (9th Cir. 1980) 15

Gray v. Laws, 51 F.3d 426 (4th Cir. 1995) 12

Hadley v. North Arkansas Community Technical College, 76 F.3d 1437 (8th Cir. 1996) 12

Haldeman v. Wyoming Farm Loan Board, 32 F.3d 469 (10th Cir. 1994) 12

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30 (1994) 13, 14

Hutsell v. Sayre, 5 F.3d 996 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994) 12

In re Amendment of State Bar Rules, 37 Wis. 2d 465, 155 N.W.2d 820 (1968) 8

In re Amendment of State Bar Rules: SCR 10.03(5), slip op. (Wis. Sup. Ct. Jan. 21, 1986) 8

In re Amendment of Supreme Court Rules, SCR 10.03(5)(b) – State Bar Membership Dues Reduction, 174 Wis. 2d xiii (1993) 9

In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar, 93 Wis. 2d 385, 286 N.W.2d 601 (1980) 8

In re Integration of the Bar, 249 Wis. 523, 25 N.W.2d 500 (1946) 7

In re Integration of the Bar, 5 Wis. 2d 618, 93 N.W.2d 601 (1958) 6, 7

TABLE OF AUTHORITIES – Continued

Page

In re Petition to Review State Bar Bylaw Amendments, 139 Wis. 2d 686, 407 N.W.2d 923 (1987) 8

In re Regulation of the Bar of Wisconsin, 81 Wis. 2d xxxv, xliv (1977) 5, 8

In re Supreme Court Rules Chapter 10: Regulation of the Bar, slip op. (Wis. Sup. Ct. May 26, 1988) 8

In re State Bar of Wisconsin: Membership, 169 Wis. 2d 21, 485 N.W.2d 225 (1992) 9

In the Matter of the Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956) 7

Integration of the Bar Case, 244 Wis. 8, 11 N.W.2d 604 (1943) 7

Jackson v. Georgia Department of Transportation, 16 F.3d 1573 (11th Cir.), *cert. denied sub nom. King v. Jackson*, ___ U.S. ___, 115 S. Ct. 320 (1994) 12, 13

Kaimowitz v. The Florida Bar, 996 F.2d 1151 (11th Cir. 1993) 15

Keller v. State Bar of California, 496 U.S. 1 (1990) 2

Krempp v. Dobbs, 775 F.2d 1319 (5th Cir. 1985) 15

Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *revaff'd*, 367 U.S. 820 (1961) 5, 8

Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989) 1

Lewis v. Louisiana State Bar Association, 792 F.2d 493 (5th Cir. 1986) 15

TABLE OF AUTHORITIES – Continued

Page

Lupert v. California State Bar, 761 F.2d 1325 (9th Cir. 1985) 15

Mancuso v. New York State Thruway Authority, 86 F.3d 289 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 481 (1996) 12, 14

McCann v. Frank B. Hall & Co., 109 F.R.D. 363 (N.D. Ill. 1986) 18

McDonald v. Board of Mississippi Levee Comm'rs, 832 F.2d 901 (5th Cir. 1987) 12

Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935 (1st Cir. 1993) 12

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 14

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, 506 U.S. 139 (1993) 13

Report of Committee to Review the State Bar, 112 Wis. 2d xix, 334 N.W.2d 544 (1983) 5, 8

Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S. Ct. 1114 (1996) 13, 14

State ex rel. Armstrong v. Board of Governors, 86 Wis. 2d 746, 273 N.W.2d 356 (1979) 8

Sturdevant v. Haferman, 798 F. Supp. 536 (E.D. Wis. 1992) 18

Thiel v. State Bar of Wisconsin, 94 F.3d 399 (7th Cir. 1996) ..... *passim*

Travelers Indemnity Co. v. School Board of Dade County, 666 F.2d 505 (11th Cir. 1982) 12

Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974) 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Wis. Const. art. VII 5

Wis. Stat. § 35.24 10

Wis. Stat. § 70.11(1) 9

OTHER AUTHORITIES

48 Op. Att'y Gen. 30 (Wis. 1959) 9, 15

75 Op. Att'y Gen. 153 (Wis. 1986) 9

6 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1487 (1990) 18

RESPONDENT STATE BAR OF WISCONSIN'S BRIEF IN OPPOSITION

The respondent State Bar of Wisconsin ("State Bar" or "Bar"), by its undersigned counsel, respectfully requests that this Court deny the petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit for review of the judgment in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner's description of the "Nature of the Case" is materially incomplete and factually inaccurate and, more importantly, largely irrelevant to the issues before this Court.

A. Course of Proceedings Below.

This case is yet another chapter in the "long history of litigation surrounding Wisconsin's mandatory bar rule." *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1397 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2138 (1994). It was originally brought against the State Bar of Wisconsin, its executive director Stephen L. Smay, and the Justices of the Wisconsin Supreme Court in May 1988, shortly after the decision in *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988). (Complaint, R. 2) Although subsequently reversed, *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989), the district court decision ruled that the integrated bar in Wisconsin violated the First Amendment to the United States Constitution.

Petitioner purported to bring this suit as a class action on behalf of all members of the State Bar who allegedly were required to support the State Bar's past expenditures in violation of the First and Fourteenth Amendments. He sought approximately $500,000 in compensatory damages (allegedly representing the amount of mandatory dues spent on unconstitutional activities during fiscal years 1983 through 1987) and some $600,000 in punitive damages for defendants' alleged reckless disregard of the petitioner's constitutional rights. (Complaint, R. 2) In addition, the complaint sought to enjoin the State Bar from returning to mandatory status. (*Id.*)

Following this Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the claims against the Justices of the Wisconsin Supreme Court, the State Bar and Smay were dismissed in their entirety. *Crosetto v. Heffernan*, 771 F. Supp. 224 (W.D. Wis. 1990); *Crosetto v. Heffernan*, 810 F. Supp. 966 (W.D. Wis. 1992)

The Court of Appeals affirmed the dismissal of the claims against the justices and Smay, but questioned *sua sponte* whether the subject matter jurisdiction of the federal courts extended to claims against the State Bar of Wisconsin. Noting that state bars had been consistently found immune from suit under the Eleventh Amendment, the Court of Appeals remanded to the district court for a determination of the State Bar's sovereign status. *Crosetto v. State Bar of Wisconsin*, 12 F.3d at 1402. This Court denied the subsequent petition for a writ of certiorari. ___ U.S. ___, 114 S. Ct. 2138 (1994).

Despite the Court of Appeals' narrow mandate, petitioner sought leave to amend the complaint to add a new

challenge to the current dues reduction rule (amended slightly while this matter was before the Court of Appeals the first time) and to add the Bar's then-current Board of Governors as defendants in order to avoid jurisdictional issues on that claim. (R. 458) At the same time, a virtually identical challenge to the State Bar's current dues reduction rule was filed by other plaintiffs in the Western District of Wisconsin, seeking declaratory and injunctive relief. *Thiel, et al. v. State Bar of Wisconsin, et al.* That case, like petitioner's proposed amended complaint, sought injunctive relief against the individual members of the Bar's Board of Governors.

The district court denied petitioner's motion to amend on two grounds. First, the district court recognized that allowing petitioner to amend would prejudice the State Bar and unduly burden the court by substantially expanding and prolonging this litigation. Second, petitioner would not be prejudiced because the claims he sought to assert were duplicative of those already pending in *Thiel* and the relief sought in that case would benefit petitioner if granted. (App. 17a-21a)[2]

On September 5, 1995, the district court issued its decision in *Thiel*. It held that the State Bar was immune from suit in the federal courts under the Eleventh Amendment and that the Bar's current dues reduction rule did not violate the First Amendment. (R. 512, Tab 1)

On December 15, 1995, the district court issued its opinion and order in this case. It, too, held that under the Eleventh Amendment, federal courts lack subject matter

---

[2] Citations to "App." refer to Petitioner's Appendix.

jurisdiction over petitioner's claims against the Bar and ordered that the case be dismissed. (App. 3a-16a)

The Court of Appeals issued its decision in *Thiel* on September 3, 1996, affirming the district court's opinion. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 400 (7th Cir. 1996). No petition for a writ of certiorari was filed in that case. On September 17, in an unreported order, relying on its decision in *Thiel*, the Court of Appeals also affirmed the trial court's opinion in this case. (App. 1a-2a)

B. Statement of Relevant Facts

The State Bar of Wisconsin is an association of all persons licensed to practice law in the State of Wisconsin. Wisconsin Supreme Court Rule (SCR) 10.01(1); 10.02(1); 10.03(1).[3] Membership in the Bar is a condition precedent to the right to practice law in Wisconsin. SCR 10.01(1); 10.03(2).

1. The Wisconsin Supreme Court has ultimate, direct and exclusive control over the State Bar and the Bar is the Court's agent in enforcing the rules challenged here.

The State Bar of Wisconsin was created by the Wisconsin Supreme Court "in the exercise of the court's inherent authority over members of the legal profession," SCR 10.02(1), to aid the Court in fulfilling its constitutional authority over the administration of justice. Wis.

---

[3] The text of the Wisconsin Supreme Court Rules governing the State Bar of Wisconsin cited here are set out in the Supplemental Appendix attached to this brief.

Const. art. VII; *Lathrop v. Donohue*, 10 Wis. 2d 230, 243, 102 N.W.2d 404, 411 (1960), *aff'd*, 367 U.S. 820 (1961). In creating the Bar, the Wisconsin Supreme Court has "by appropriate orders . . . provide[d] for the organization and government of the association." SCR 10.01(2). Thus, the Bar does not follow the legislative procedures set out in the Wisconsin Statutes applicable to many other state agencies.

In addition to the crucial decision to integrate the Bar – the decision which is really at the heart of this case – and the broad authority contained in SCR 10.01(2) to define the rights, obligations and conditions of membership, the Supreme Court manifests its ultimate authority over the State Bar in a variety of ways. For example:

> (1) the Bar is required to include in each year's membership dues the amount necessary to pay the costs of the Board of Attorneys Professional Responsibility and the continuing legal education functions of the Board of Bar Examiners (SCR 10.03(5)(a));
>
> (2) the Court also retains ultimate control over Bar dues and the Bar's budget by (a) retaining ultimate authority over any increase in Bar dues (SCR 10.03(5); *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xliv (1977)); (b) limiting the activities in which the Bar may be engaged, specifically limiting the use of dues for ideological and political activities and providing a remedy for Bar members who believe the Bar has overstepped its authority (SCR 10.03(5)(b)); (c) prohibiting the Bar from making contributions to candidates for public office (*Report of Committee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983)); (d) requiring Bar sections to

charge annual dues (SCR 10.05(4)(e)(4)); (e) requiring the Board of Governors to procure an annual audit of the Bar's books (SCR 10.09(1)) and requiring a copy of the annual audit report to be filed with the Supreme Court (SCR 10.09(2)); and (f) requiring the Bar to give notice before suspending a member for nonpayment of dues (*Disciplinary Proceedings Against Cyrak*, 124 Wis. 2d 493, 498, 369 N.W.2d 708, 711 (1985));

(3) the Court's rules set the deadlines within which members must enroll and pay dues and establish the penalty for nonpayment of Bar dues (SCR 10.03(2), 10.03(6));

(4) the Court's rules establish the manner in which the Bar may conduct its daily business, establish the Bar's governing bodies and offices and define their respective powers, functions and duties (SCR 10.04-.09, 10.11); and

(5) the Court retains ultimate authority to review amendments of the Bar's bylaws (SCR 10.05(4)(a)(8)).

The Wisconsin Supreme Court also has the exclusive, inherent power to take remedial action against the Bar upon sufficient showing that the activities or policies of the Bar are not in harmony with the objectives of integration or are otherwise contrary to the public interest. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

In the exercise of its authority over the Bar, the Wisconsin Supreme Court has provided the State Bar with a fair degree of autonomy in the conduct of its daily affairs. For example, it may, "for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and

dispose of real and personal property." SCR 10.02(1). Its funds are deposited in accounts held in the name of the State Bar of Wisconsin. (R. 127, ¶ 37) It handles its own personnel matters, setting its own wage rates and classifications, providing its own pension, health insurance and other benefits plans, and paying its employees on checks drawn on State Bar accounts. (*Id.*, ¶ 38; R. 141, ¶ 38)[4]

Despite this day-to-day autonomy, the Supreme Court has explicitly recognized and exercised its authority over the Bar numerous times. Since 1943, the structure, purposes and activities of the Bar have undergone repeated review by the Court and by committees appointed by the Court for that purpose. *See, e.g., Integration of the Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943) (declining to integrate the Bar); *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946) (same); *In the Matter of the Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956) (integrating the Bar on an interim basis and adopting Supreme Court Rules governing the Bar); *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958) (making its

---

[4] The State Bar's general autonomy in day-to-day activities noted by petitioner has never been disputed by the State Bar. However, the State Bar does dispute the statement made (several times) in petitioner's brief that while the State Bar does not follow certain statutes regarding state employees or other fiscal matters "it has never been told by the Wisconsin Supreme Court that it is free to disregard them." *See, e.g.*, Petitioner's Brief at 8. That statement is false. Wisconsin Supreme Court rules establishing and governing the Bar explicitly deal with the Bar's rights and obligations with respect to those matters. *See, e.g.*, SCR 10.05(4) (defining the duties and responsibilities of the Bar's Board of Governors).

integration order permanent); *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961) (rejecting challenge to the Bar on First Amendment grounds); *Axel v. State Bar of Wisconsin*, 21 Wis. 2d 661, 124 N.W.2d 671 (1963) (denying injunction to prevent Bar from publishing the results of a judicial qualification poll); *In re Amendment of State Bar Rules*, 37 Wis. 2d 465, 155 N.W.2d 820 (1968) (amending rule concerning dues of judicial members); *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1977) (among other things, continuing integration order, creating rule providing for regular review of Bar activities, authorizing section legislative activities, approving dues increase and prohibiting Bar support for political candidates); *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 273 N.W.2d 356 (1979) (rejecting petition to submit issue of integration and use of dues to membership of Bar); *In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980) (denying petition to disintegrate Bar and appointing committee to review activities of the Bar); *Report of Committee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983) (among other things, continuing integration of the Bar, accepting recommendation of a procedure allowing dues reduction for legislative activities, and prohibiting Bar involvement in LAWPAC); *In re Amendment of State Bar Rules: SCR 10.03(5)*, slip op. (Wis. Sup. Ct. Jan. 21, 1986) (establishing a dues reduction for legislative activities) (R. 69, Tab 67); *In re Petition to Review State Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987) (rejecting constitutional challenge to legislative activities dues reduction and arbitration bylaw); *In re Supreme Court Rules Chapter 10: Regulation of*

the Bar, slip op. (Wis. Sup. Ct. May 26, 1988) (disintegration order) (R. 269, ¶ 3, Exhibit A); *In re State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992) (reintegrating the State Bar); *In re Amendment of Supreme Court Rules, SCR 10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii (1993) (amending the rule relating to the use of dues for political and ideological activities).

2. State Bar funds are state funds.

Property owned by the State Bar of Wisconsin is exempt from real and personal property taxation under Wis. Stat. § 70.11(1) because it is property owned by the state. 48 Op. Att'y Gen. 30 (Wis. 1959) (R. 439, Tab 3). State Bar funds are state funds (although, pursuant to SCR 10.04(2)(e), 10.09, and 10.11(2), they need not be deposited in the same accounts as other state funds). *Id.* at 34-35. The Bar does not pay Wisconsin sales or income tax. (R. 273, Tab 5, ¶ 19). It is not subject to federal income tax and is not required to file income tax returns. 48 Op. Att'y Gen. at 38.

3. The State Bar is a state agency under Wisconsin law.

The Bar, its Board of Governors, employees and agents have been and will in the future be represented by the Attorney General of the State of Wisconsin for acts within the authority granted by the Wisconsin Supreme Court. 75 Op. Att'y Gen. 153 (Wis. 1986). (R. 439, Tab 4) Volunteer lawyers performing services in connection with

the State Bar's Lawyer Referral and Information Service are public officers entitled to indemnification as agents of the state. *Id.* The State Bar is authorized as an "agency of Wisconsin state government" to use the legislative drafting services of the Legislative Reference Bureau. Joint Rules of the Wisconsin Legislature No. 51(2) (R. 436). The Wisconsin Blue Book, which is required by the legislature to include information "pertaining to the organization of Wisconsin state government," Wis. Stat. § 35.24, lists the State Bar as an "Associated Unit" of the Judicial Branch of the State of Wisconsin. Wisconsin Blue Book, pp. 607-08 (R. 439, Tab 5).

C. Response to Petitioner's "Factual Background."

Petitioner devotes a substantial portion of his brief addressing the State Bar's alleged LAWPAC activities and timekeeping practices, all of which occurred in the early 1980s. Only two responses are necessary.

First, petitioner's complaints were expressly considered, and rejected, by the district court in its first opinion dismissing petitioner's claims. *See Crosetto v. Heffernan*, 810 F. Supp. at 979 (no "real evidence" to support petitioner's complaints concerning LAWPAC; "Plaintiffs' allegations [concerning timekeeping practices] are not supported by the record"). Since the Court of Appeals affirmed the district court's opinion and this Court refused further review, that decision is law of the case.

Second, none of those "facts" are material. Even if petitioner's allegations were true, they have nothing to

do with whether the Eleventh Amendment bars petitioner's claims against the State Bar or whether his motion to amend was properly denied.[5]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CASE LAW.

A. There Is No Conflict In The Tests Used By The Courts Of Appeals To Determine Whether An Entity Is An Arm Of The State Under the Eleventh Amendment.

Petitioner argues that this Court should review the decision below because there is a conflict in the case law between the decision below and the decisions of the other Courts of Appeals. United States Supreme Court Rule 10. In essence, petitioner claims that unlike the decision of the Court of Appeals below, the majority of circuits have held that the Eleventh Amendment bars suit only where a judgment will be satisfied from state funds.

Although circuit courts have articulated the analysis in slightly different ways, they have consistently held that the impact of a judgment on the state treasury is not

---

[5] This same response applies to petitioner's discussion of the State Bar's 1988 dispute with the United States Postal Service concerning its classification for bulk mailing privileges under the Service's rules. Whether the State Bar is (or was in 1988) a "governmental entity" for purposes of bulk mailing privileges under Postal Service regulations is an entirely different issue than whether it is immune from suit under the Eleventh Amendment.

the only factor to consider in determining whether a defendant is entitled to immunity under the Eleventh Amendment and that immunity may attach even in the absence of any fiscal impact if other factors are present. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 991 F.2d 935, 939-40 (1st Cir. 1993); *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 293 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 481 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 340 (1995); *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir. 1995); *McDonald v. Board of Mississippi Levee Comm'rs*, 832 F.2d 901, 906-08 (5th Cir. 1987); *Hutsell v. Sayre*, 5 F.3d 996, 999-1002 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Thiel*, 94 F.3d at 401; *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1440-42 (8th Cir. 1996); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *Haldeman v. Wyoming Farm Loan Board*, 32 F.3d 469, 473 (10th Cir. 1994).

The only exception to this unanimity is the Eleventh Circuit's decision in *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir.), *cert. denied sub nom. King v. Jackson*, ___ U.S. ___, 115 S. Ct. 320 (1994), which stated that "Eleventh Amendment immunity applies only if the judgment *must*, under all circumstances, be paid out of state funds." *Id.* at 1577 (emphasis in original) (citing *Travelers Indemnity Co. v. School Board of Dade County*, 666 F.2d 505, 509 (11th Cir. 1982)). That single decision, however, does not create a conflict requiring review on *certiorari*. The portion of the *Travelers Indemnity* decision on which the *Jackson* Court relies is nothing more than a paraphrase of this Court's holding in *Edelman v. Jordan*, 415 U.S. 651

(1974). And, as this Court has itself made clear, "*Edelman* did *not* hold . . . that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought." *Cory v. White*, 457 U.S. 85, 90-91 (1982) (emphasis added). *See also Seminole Tribe*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996); discussion below. Thus, the Eleventh Circuit's decision in *Jackson* is not only in conflict with the decisions of the other Courts of Appeals, but more importantly, of this Court. It should, therefore, be disregarded as a basis for granting *certiorari* in this case.

B. This Court Has Already Resolved Any Arguable Uncertainty.

The lack of meaningful conflict among the circuits is not surprising. This Court has consistently held that the Eleventh Amendment bars all suits by private parties against unconsenting states and state entities without regard to the type of relief requested by the plaintiff or impact on the public treasury. As this Court explained recently in its most recent decision addressing the scope of the Eleventh Amendment:

> The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. [30], ___, 115 S. Ct. 394, 404 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S. [139,] 146.

Seminole Tribe, 116 S. Ct. at 1124. *See also Alabama v. Pugh*, 438 U.S. 781 (1978); *Cory v. White*, 457 U.S. at 90 (quoting *Edelman*, 415 U.S. at 663) (expressly rejecting the view that the Eleventh Amendment applies only to "suits 'by private parties seeking to impose a liability which must be paid from the public funds in the state treasury.' "); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) ("a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain *or* interfere with the public administration *or* if the effect of the judgment would be to restrain the Government from acting or to compel it to act." (emphasis added)).

The analysis in *Hess*, while not directly applicable to single state entities like the State Bar of Wisconsin (*see Hess*, 513 U.S. at ___, 115 S. Ct. at 402), is also illustrative. In *Hess*, this Court placed little emphasis on the issue of whether a judgment would have an impact on a state treasury until *after* it had determined that other indicators of immunity pointed in opposite directions. *Id.* at ___, 115 S. Ct. at 404; *Mancuso v. New York State Thruway Authority*, 86 F.3d at 293 (only if other indicators of immunity are evenly balanced will treasury factor control). *See also Hess*, 513 U.S. at ___, 115 S. Ct. at 400 (recognizing that while the initial impetus for the Eleventh Amendment was fear of damage claims, "current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system.").[6]

---

[6] The fact that this Court has granted a petition for writ of *certiorari* in *Regents of the University of California v. Doe*, No. 95-1694, does not support petitioner's argument that the Court

C. The Lower Courts Are Unanimous In Holding That Integrated Bars Are Entitled To Eleventh Amendment Immunity.

As further evidence that no conflict or confusion need be addressed by the Court on this issue, lower courts are unanimous in their application of this Court's Eleventh Amendment analysis to integrated state bars. Every Court of Appeals faced with the issue of sovereign immunity for an integrated state bar has recognized that those bars are agents or agencies of their respective supreme courts and subject to those courts' ultimate control. Thus, each court has held that an integrated bar is immune from suit in federal court under the Eleventh Amendment. *Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993); *Lewis v. Louisiana State Bar Association*, 792 F.2d 493 (5th Cir. 1986); *Krempp v. Dobbs*, 775 F.2d 1319 (5th Cir. 1985) (Texas Bar); *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir. 1985); *Clulow v. State of Oklahoma*, 700 F.2d 1291, 1299 n.11 (10th Cir. 1983); *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir. 1980). *See also Burcher v. McCauley*, 871 F. Supp. 864, 865 n.1 (E.D. Va. 1994) (Virginia Bar); *Cohran v. State Bar of Georgia*, 790 F. Supp. 1568,

---

should grant his petition here; it does just the opposite. If this Court believes it necessary to clarify how the impact on a state treasury figures into Eleventh Amendment jurisprudence, it will do so in *Regents*. In any event, unlike *Regents*, the issue is irrelevant to the outcome of this case. Under Wisconsin law, State Bar funds are state funds. 48 Op. Att'y Gen. at 34-35. Thus, even if the impact on a state treasury were the only issue determining whether the Eleventh Amendment applies, the dismissal of petitioner's claims here was proper.

1565 (N.D. Ga. 1992). There is no need and no reason for this Court to address the issue further.

II. PETITIONER'S MOTION TO ADD NEW PARTIES AND NEW CLAIMS WAS PROPERLY DENIED WHERE THE ONLY ISSUE REMAINING ON REMAND WAS JURISDICTIONAL, DISCOVERY HAD BEEN COMPLETED AND THE NEW CLAIMS WERE ALREADY THE SUBJECT OF A PARALLEL PROCEEDING.

While this case was on appeal the first time, the Wisconsin Supreme Court amended the dues reduction rule challenged by petitioner. After remand, petitioner attempted to amend his complaint to add the then-members of the Bar's Board of Governors and to challenge the revised rule. His motion was denied. Petitioner argues that denial was an abuse of discretion which this Court should review on *certiorari*. This is so, he argues, because the Court of Appeals ruled that there was a "flat-out ironclad prohibition on any complaint amendment" where an appellate court remands a case for determination of a single issue. Petition at 24. Petitioner mischaracterizes the Court of Appeals' decision and the facts of this case. Moreover, even if petitioner's characterization were accurate, the error he asserts consists of no more than erroneous factual findings or the misapplication of law. Neither warrants this Court's review on *certiorari*. United States Supreme Court Rule 10.

The decision to grant or deny the motion to amend is within the sound discretion of the district court and will be overturned only where the court abused its discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A court abuses its

discretion when it fails to justify its decision to deny leave to amend, *id.* or bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The court here did none of those things.

First, the district court explained the basis for the decision to deny petitioner's motion: (1) the proposed amendment sought to add new parties and to challenge a new rule, so it would have significantly expanded the litigation, required significant additional preparation by the court and defendant, and unduly prejudiced the defendant, (2) the additional burden which would have resulted from granting the motion was entirely unnecessary in light of the fact that a suit raising the same claims sought to be added by amendment was already pending in another court (*Thiel*), and (3) it was beyond the scope of the Court of Appeals' remand. (App. 19a-21a)

Second, contrary to petitioner's statements, the Court of Appeals did not affirm the district court because its mandate prohibited the amendment. Rather, it held that the district court's decision and the reasons it gave for that decision were within the bounds of its discretionary authority and consistent with the mandate. (App. 2a) Moreover, since *Thiel* had since upheld the constitutionality of the Bar's current dues reduction rule (adversely to petitioner), there was no longer any reason to "go back to Square One." (*Id.*)

Third, the lower courts' rulings were consistent with the law upholding denial of a motion to amend where it would be futile, or where it would be prejudicial to the

defendant because it would raise entirely new and separate claims and add new parties, and when the amendment would require expensive and time consuming new discovery. *See, e.g., Foman*, 371 U.S. at 182; *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974); *Sturdevant v. Haferman*, 798 F. Supp. 536 (E.D. Wis. 1992); *Conroy Datsun Ltd. v. Nissan Motor Group*, 506 F. Supp. 1051 (N.D. Ill. 1980); *McCann v. Frank B. Hall & Co.*, 109 F.R.D. 363 (N.D. Ill. 1986). *See also generally* 6 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1487 n.9 (1990).

Finally, those rulings were factually correct. Petitioner argues that the district court "clearly erred when it stated that the complaint amendment represented 'a completely new claim that is dissimilar to the issues remaining, thus expanding the scope of this lawsuit.' " Petition at 27-28. It is petitioner who is in error. At the time petitioner filed his motion to amend, the only remaining issue in this action was whether his claims for retroactive relief against the State Bar of Wisconsin were barred by the Eleventh Amendment. His claims for injunctive relief against the 1992 dues reduction rule had already been dismissed, as had his claims for retroactive relief against the justices of the Wisconsin Supreme Court and the Bar's Executive Director. What he sought by amending his complaint was to add numerous additional individual defendants and to challenge the new rule. His new claims were completely dissimilar to the jurisdictional issue which remained, would have resulted in substantial additional burdens on both the court and defendant, and were completely unnecessary because the same rule was being

challenged contemporaneously in *Thiel*. Thus, the court properly denied the motion to amend.

CONCLUSION

For all of the reasons discussed above, respondent State Bar of Wisconsin respectfully submits that the petition for a writ of certiorari should be denied.

Dated this 17th day of January, 1997.

Respectfully submitted,

*John S. Skilton
William M. Conley
Roberta F. Howell
Foley & Lardner
150 East Gilman Street
Post Office Box 1497
Madison, Wisconsin 53701-1497
(608) 257-5035

Attorneys for Respondent
State Bar of Wisconsin

**Counsel of Record*